Scott & English (M) Sdn Bhd v Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO KG 111 OF 1991
CHONG SIEW FAI J
22 JULY 1993

Civil Procedure *— Summary judgment — Order obtained by plaintiff was drawn up, passed, sealed and entered — Plaintiff later applied to have order varied — Whether senior assistant registrar could vary order — Whether senior assistant registrar was functus officio*

Civil Procedure *— Jurisdiction — Senior assistant registrar — Whether senior assistant registrar had jurisdiction to vary order for summary judgment*

Words and Phrases *— 'Or further order'*

The defendants appealed against the decision of the senior assistant registrar in allowing an order for summary judgment, obtained by the plaintiff, to be varied. The order had already been drawn up, passed, sealed and entered.

Held, allowing the appeal:

(1) The learned senior assistant registrar was functus officio. If the plaintiff was not satisfied with that part of the order, it should have appealed or steps to vary should have been timely taken before the order was perfected.

(2) The words 'or further order' in the order did not authorize the learned senior assistant registrar to vary the order as he did. It may be that another order may be made or that the circumstances of the case might well justify the making of a further order. But that is quite different from varying the said order as the learned senior assistant registrar did.

(3) As regards the contention that the words 'or further order' meant or were equivalent to 'liberty to apply', even if this was correct, it did not confer a right to ask the court to vary an order.

[Bahasa Malaysia summary

Defendan telah membuat rayuan terhadap keputusan penolong kanan pendaftar membenarkan suatu perintah untuk penghakiman terus, yang telah diperolehi oleh plaintif, supaya digubah. Perintah itu telah dibuat, diluluskan, dimeterai dan dicatat.

Diputuskan, membenarkan rayuan itu:

(1) Penolong kanan pendaftar yang arif adalah functus officio. Jika plaintif tidak berpuas hati dengan sebahagian daripada perintah itu, beliau sepatutnya membuat rayuan atau mengambil langkah untuk menggubah perintah itu sebelum ianya disempurnakan.

(2) Perkataan-perkataan 'or further order' di dalam perintah itu tidak memberi kuasa kepada penolong kanan pendaftar yang arif untuk menggubah perintah itu sebagaimana yang telah dibuatnya. Mungkin juga sesuatu perintah yang lain akan diberi atau keadaan kes mungkin menjustifikasikan supaya suatu perintah selanjutnya dibuat. Tetapi ini adalah berlainan daripada menggubah perintah itu sepertimana yang telah dilakukan oleh penolong kanan pendaftar yang arif itu.

(3) Berkaitan dengan hujah bahawa perkataan-perkataan 'or further order' bermaksud atau adalah selaras dengan 'liberty to apply', walaupun ini mungkin betul, ia tidak memberi hak untuk meminta supaya mahkamah menggubah suatu perintah.]

Notes

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2178–2296.

Cases referred to

1 *Re VGM Holdings Ltd* [1941] 3 All ER 417; [1942] Ch 235 (refd)
2 *Cristel v Cristel* [1951] 2 KB 725; [1951] 2 All ER 574 (refd)

NC Jie (*Jee Nyuk Choo & Co*) for the defendants.
TO Thomas (*Thomas & Co*) for the plaintiff.

Cur Adv Vult

Chong Siew Fai J: This is an appeal by the defendants against the decision of the learned senior assistant registrar varying an order made on 25 January 1992.

Briefly, the facts are as follows: The plaintiff sued the first defendant as principal debtor and the second and the third defendants as guarantors for the payment of a total sum of RM138,500 and further interest on goods supplied and services rendered. The defendants delivered a defence while the first defendant also counterclaimed for a sum of RM16,613.50 and damages for breach of contract. By an O 14 application, the plaintiff successfully obtained an order dated 25 January 1992 for summary judgment as claimed in the statement of claim. The order included, inter alia: ' ... that execution of this judgment be stayed pending the outcome of the trial of the counterclaim or further order.'

The order as granted was clear and unequivocal, ie execution be stayed pending the outcome of the trial of the counterclaim or further order. The order was drawn up, passed, sealed and entered.

About one and a half months later, the plaintiff, by a summons-in-chambers dated 9 March 1992, applied to set aside the part of the order on execution quoted above or to have the same:

... substituted by the following words: 'It is also hereby ordered that execution of part of this judgment to the extent of RM16,613.50, being the amount

A claimed by the first defendant by its counterclaim, be stayed pending the outcome of the trial of the counterclaim or further order.

The defendants objected to the application.

After hearing the arguments, the learned senior assistant registrar allowed the application on 24 October 1992 and ordered, inter alia:

B ... that the order herein dated 25 January 1992 be varied by substituting the following words, that is, 'It is also hereby ordered that execution of part of this judgment to the extent of RM16,613.50, being amount claimed by the first defendant by counterclaim, be stayed pending the outcome of the trial of the counterclaim', in place of the last three lines of the said order of 25 January 1992.

C It is against this order of 24 October 1992 that the defendants appeal.

I consider it necessary to deal only with the power of the learned senior assistant registrar to make this order of 24 October 1992 as he did. Since the order dated 25 January 1992 had been drawn up, passed, sealed and entered, had he, who granted the order, the jurisdiction to vary it by the subsequent order of 24 October 1992? For the plaintiff, Mr Thomas D contended that the learned senior assistant registrar had, because of the wording 'or further order' contained in the first order of 25 January 1992 and that the term 'or further order' meant with liberty to apply. With respect, I am unable to agree. In my opinion, the learned senior assistant registrar was functus officio. See *Re VGM Holdings Ltd.*[1] If the plaintiff was E not satisfied with the part of the order, it should have appealed (which it did not) or steps to vary should have been timely taken before the order was perfected. I do not think the words 'or further order' in this order of 25 January 1992 authorized the learned senior assistant registrar to *vary* the order as he did. It may be that another order may be made or that the circumstances of the case (eg that the judgment of the plaintiff's claim far F exceeded the first defendant's counterclaim) might well justify the making of a further order. But that is quite different from *varying* the said order of 25 January 1992 as the learned senior assistant registrar did.

As regards the contention that the words 'or further order' meant or were equivalent to 'liberty to apply', even if this is correct, it did not confer a right G to ask the court to vary an order. See *Cristel v Cristel.*[2]

The learned senior assistant registrar, in my opinion, had no jurisdiction to vary or amend the already perfected order of 25 January 1992. The appeal is allowed. The order of 24 October 1992 is set aside.

Costs of and incidental to the plaintiff's summons dated 9 March 1992, including the hearing thereof and the costs of this appeal be taxed, if not H agreed, and paid by the plaintiff/respondent to the defendants/appellants.

Appeal allowed.

Reported by Jeanne Tan

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